IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JILL ALTMAN, INDIVIDUALLY AND ON BEHALF OF A CLASS,	:	
PLAINTIFF,	:	
vs.	:	DOCKET NUMBER
	:	1:15-CV-2451-SCJ-JKL
WHITE HOUSE BLACK MARKET, INC., AND DOES 1-10,	:	
DEFENDANTS.	:	

TRANSCRIPT OF ORAL ARGUMENT PROCEEDINGS

BEFORE THE HONORABLE JOHN K. LARKINS, III

UNITED STATES MAGISTRATE JUDGE

OCTOBER 20, 2017

9:08 A.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED TRANSCRIPT PRODUCED BY:

OFFICIAL COURT REPORTER: ***SHANNON R. WELCH, RMR, CRR***
2394 UNITED STATES COURTHOUSE
75 TED TURNER DRIVE, SOUTHWEST
ATLANTA, GEORGIA 30303
(404) 215-1383

A P P E A R A N C E S O F C O U N S E L

FOR THE PLAINTIFF:

KEITH JAMES KEOGH
KEOGH LAW, LTD

JUSTIN THARPE HOLCOMBE
SKAAR & FEAGLE, LLP

FOR THE DEFENDANTS:

BARRY GOHEEN
JOHN ANTHONY LOVE
KING & SPALDING

I N D E X T O P R O C E E D I N G S

* * *

ARGUMENT

by Mr. Keogh 5
by Mr. Goheen 15
by Mr. Keogh 48

CERTIFICATE 56

P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; October 20, 2017.)

THE COURT: All right. This is Case Number 15-2451, *Jill Altman vs. White House Black Market, Inc.* The case is before the Court on the plaintiff's motion for class certification.

In the courtroom today -- I don't believe I have met any of you personally. So if you wouldn't mind introducing yourselves, I would appreciate it. Start with the plaintiff.

MR. KEOGH: Good morning, Your Honor.

THE COURT: Y'all are the plaintiffs?

MR. KEOGH: Yes.

THE COURT: Y'all switched sides on me here.

MR. KEOGH: Do you want us to switch?

THE COURT: No.

MR. KEOGH: Good morning, Your Honor. Keith Keogh for the plaintiff.

THE COURT: Hi, Mr. Keogh. Nice to meet you.

MR. KEOGH: Nice to meet you as well.

MR. HOLCOMBE: Justin Holcombe for the plaintiff.

THE COURT: Mr. Holcombe, good to see you.

MR. GOHEEN: Good morning, Your Honor. Barry Goheen for the defendant.

MR. LOVE: Good morning, Your Honor. Tony Love for defendant.

THE COURT: All right. Gentlemen -- well, Mr. Keogh, are you going to do the argument today?

MR. KEOGH: I am, Your Honor.

THE COURT: All right. Since it is your motion, I'll be glad to hear from you first.

MR. KEOGH: Certainly.

(There was a brief pause in the proceedings.)

ARGUMENT

MR. KEOGH: Your Honor, my plan is to briefly summarize and not repeat too much what is in the briefs because I think we've had a lot of briefing here. And it has been somewhat exhaustive.

So obviously I think if you have any questions, please interrupt me. Because I think that might be more helpful than me repeating what is in the brief.

With that being said, plaintiffs strongly believe this case is appropriate for class certification. And one great way to look at why it is appropriate is look at defendants' arguments and actions. Their actions and arguments are the same for virtually every single class member.

Their standing argument applies to every single class member. Their lack of willfulness argument applies to every single class member. The way they installed their systems when they rolled it out in 318 stores, the way they tested it for each store is the same for every single class member.

And based upon discovery, we know that they rolled out their new credit card processing software system in 318 stores. And for the time period between March 23rd, 2015, and until shortly after plaintiff filed this lawsuit, they stopped printing -- they were printing violative receipts until June 17th of the same year. And the system was programmed to print these receipts because they use the same system they use in Canada where it is purposely programmed to do this. And even though they tested it, they didn't catch the issue here or they didn't care. But those issues and willfulness are the same for every class member.

Now, defendant has identified in discovery about 360,000 transactions between that time period for those 318 stores. And defendant has withdrawn its argument whether something was printed or e-mailed, and we filed a notice of withdrawal, and we included the e-mail to this Court where they withdrew that argument.

So unlike the *Guarisma* case they recently cited yesterday where there was an issue where there was no evidence whatsoever of whether someone who stays at a hotel checked out at the front desk or not. They didn't track it. Their systems weren't programmed to do it. We don't have that here.

We actually have the list of every transaction at issue. And I believe defendant said a couple of them might have been returns or exchanges. But we can go through that

list and remove those if that is an issue. So we have --

THE COURT: How do you identify the ones that are returns or exchanges?

MR. KEOGH: The transaction information has that.

THE COURT: Okay.

MR. KEOGH: It is all -- just like they would identify it. If I walked in the store and asked about -- you know, gave my credit card, they would have a record of my purchase and exchange.

THE COURT: Is that on that spreadsheet?

MR. KEOGH: That is not on the spreadsheet. But their discovery responses state that they note they -- a certain percentage include those. So it is just a matter of them willing to do that. They say it is a big production expense.

But we'll do it for them if they don't want to do it. We can have our data card person go through that sheet. And I'm a little skeptical. They know how many returns they have. They know what their profitability is.

THE COURT: So you are saying you can readily ascertain those transactions?

MR. KEOGH: Yes, Your Honor. I don't think it is any different than saying, you know, give me all the transactions over $5. It is just a query is all it is.

And even though they withdrew the e-mail argument,

once again, there's over 23,000 transactions without even an e-mail address. I know it has been withdrawn. But since they raised it yesterday in a roundabout way when they brought up *Guarisma*, I want to make sure there is really no issue here between whether something was printed or e-mailed. They withdrew the argument, and they even admitted there is a small percentage here.

So it is apparent because this case really is a -- it is the cliche classic textbook case for certification. We have a uniform practice. We have a statutory claim. We have numerosity. We have common actions.

Then defendants spend most of their time attacking standing and adequacy. And for adequacy, they are not attacking plaintiff as much as they are attacking plaintiff's former counsel. Well, that is why we are here. That is why my firm filed an appearance, Mr. Holcombe's firm filed an appearance, and Mr. Wexler withdrew. Because we agree that Mr. Wexler could not or I should say should not -- some courts have allowed it -- but should not represent a relative to the class representative.

And as the Court is well aware, he filed an attorney lien in the case. So, you know, it is very clear that he won't be entitled to anything unless the court thinks he is. So that issue was mooted before the plaintiff moved for class certification. It really isn't an issue.

So with that, Your Honor, I really don't have much of anything else to say except for I would be happy to answer any questions on any other particular arguments.

THE COURT: I would like to ask you about ascertainability. One of the issues that you alluded to in a footnote in your opening brief was this business about some transactions being made with a business credit card versus a personal credit card.

And, you know, they have come back and said that it is essentially foolish to assume that every transaction at White House Black Market during this time period was a consumer transaction, that there could have been some business purposes.

And you have come back, and you have pointed to a portion of Mr. Coker's report where he, as I understand it, kind of outlines ways that he can apparently differentiate between business transactions or transactions made using a business card -- I suppose is the proper terminology -- and a consumer card. But I've got a couple of questions there.

First of all, for Mr. Coker's report, has he actually analyzed the data that White House Black Market has produced in this case to determine whether he can make that differentiation in this case?

MR. KEOGH: No, Your Honor. The argument was raised after he filed his report. And the credit card numbers are the same -- I mean, the analysis is the same in this case as in

every case. You look at the credit card numbers, and you look at first whether they indicate a consumer or business account.

So it is kind of like saying, I haven't drove 20 miles per hour in a Ford, but I have driven 20 miles per hour in a Chevy. I can drive 20 miles per hour. There is no distinction between the data here and the data in other cases.

But even taking a step back, you know, our first argument is: It doesn't matter; that FACTA applies equally to both business and consumer accounts.

THE COURT: I think I disagree with you on that. I mean, my read -- push back if you would. But my read of the law is that, you know, FACTA may not differentiate. But the liability under the FCRA seems to distinguish between the consumer transactions, for lack of a better term, and the business ones.

Am I wrong about that?

MR. KEOGH: There is no qualification for consumers. You won't find that limitation in either the FACTA -- the statutory damages claim portion. So that is why the couple of cases we cited found there is no distinction.

And, you know, so our position is that it really doesn't matter. And that is a merit issue. And if we are right, you know, they can't raise, I would argue, a false merit issue that precludes certification.

THE COURT: Yeah. But it is not -- but it seems

rational to make that determination now. Because, I mean, if I agree which -- my own review of the case law seems to indicate that at least the majority of the cases seem to recognize this differentiation.

And I haven't made a final decision on that obviously. But it seems like it would be appropriate to at least weigh in on that issue now because it does, I think, go into the ascertainability. And I think what concerns me most is, you know, what we have is -- what I sense is -- I don't know if hostility is the right word. But we have some pretty stern warnings from the Eleventh Circuit about class certification, things along the lines of that it is not something to be assumed. This is the exception, not the rule. The plaintiff bears the burden of proof as to each element. Things of that nature. And the Eleventh Circuit has also instructed trial courts to conduct a rigorous examination.

And so what I'm -- what I'm trying to satisfy myself with is that you-all have made the analytical leap from Mr. Coker's statement that, you know, in the vast majority of situations he's been involved in he is able to differentiate between business and consumer transactions and the information that has been produced in this case. And it hasn't been done.

And so what I'm concerned about is: Have you carried your burden of proof there to satisfy, you know, the Eleventh Circuit ultimately down the road, or is it enough to simply

have Mr. Coker say in his report, this is done in lots of other cases. You know, I drive Chevies, and this is a Ford, and therefore the Ford should act like a Chevy.

MR. KEOGH: Okay. And let me take those in the order you raised them. I think most of the case law discusses the consumer versus business. There is no analysis on the actual statute. A lot of them discuss FDCPA cases where it has to be consumer debt. It is very limited and a very precise term where a business debt wouldn't qualify.

But even in those FDCPA cases, there is a whole plethora of class certification rulings saying that the issue of whether it is consumer debt versus a business debt doesn't preclude certification. It is not such an individual issue, and it is something that can be administratively figured out.

And that goes into the Court's comments regarding the Eleventh Circuit. And as we pointed out in our reply, you know, it is plaintiff's burden. We absolutely agree with that. But as the Supreme Court said in *Shady Grove*, if we meet the requirements, we're entitled to class certification. So the exception-not-the-norm language simply means that you have to show that Rule 23 applies, you know, that Rule 23 is the exception. But once it applies, the class should be certified.

The Eleventh Circuit just had a great case -- the name escapes me. It was an FDCPA case. It was an unpublished decision that I would be happy to file it in five minutes or

maybe look it up when counsel is speaking where they talked about the importance of consumer claims. And the judge made a couple of various other rulings in nonclass certification on ascertainability. And they reversed. So I think the trend in the Eleventh Circuit may be going a little bit the other way.

But in any event, for this case, you know, our burden is to show it can be administratively identified. We don't have to show at certification because in most cases we don't get the underlying data. We don't get the class list. We might get some sample or something.

So you will find very few class certification orders where the plaintiff has all the data and has done all the work and said, you know, we have already done it. Here it is. It is usually, here is the process. We can do it. And that is the burden we have met. We have shown that based upon the transaction data it can be done.

If the Court wants it done, we can do that. I mean, it would take a short manner of time. Obviously class certification is always granted or denied without prejudice. It can always be revisited.

So to the extent the Court feels that we haven't met our burden, that you want it done, not just shown it can be done, we can do that.

THE COURT: Or alternatively I can grant certification and then with the caveat that if you-all can't do

it for some reason then we can revisit the propriety of certification.

MR. KEOGH: That is a much better suggestion than what I said, Judge.

THE COURT: I thought you might say that.

MR. KEOGH: And, quite frankly, I mean, courts have not hesitated to decertify classes when the plaintiffs haven't been able to do what they said they have done. So we understand that.

But -- you know, so our first position is the law is required. And in this context here of a women's clothing store, it is unlikely to have business transactions. It is possible. But they haven't shown a significant -- I'm surprised defendant hasn't come in with statistics saying that X percent of their sales are business sales. Most businesses track that. You would think if they had something that would help them they would have raised it. They didn't. They just said you can't assume.

Well, I think it is safe to assume for a retail consumer women's clothing store that they sell women's clothing to consumers. Not businesses. The whole market is for consumers.

But to the extent that we want to even go further, you know, Mr. Coker has identified, you know, that we can sort the information out by removing the business credit cards and

you know -- which might be overinclusive. But that is better than, you know, throwing-out-the-baby-with-the-bath-water-type of issue.

So I would urge the Court to certify the class. We have shown that it can be done. And if it turns out that it cannot be done, then obviously the Court can always decertify.

THE COURT: All right. Anything further?

MR. KEOGH: Nothing, Your Honor. Thank you.

THE COURT: All right. Thank you, Mr. Keogh.

MR. KEOGH: Actually may I -- that case I was talking about from the Eleventh Circuit, could I just file the case without any argument? Just the brief or just the order?

THE COURT: Yeah. Sure. That is fine. Mr. Holcombe seems to be waving at you. Do you have it?

MR. HOLCOMBE: I believe he is referring to *Dickens vs. GC Services*, but I may be incorrect.

THE COURT: What is the name of the case?

MR. HOLCOMBE: *Dickens vs. GC Services*.

THE COURT: Dickens, D-I-C-K-E-N-S?

MR. HOLCOMBE: Yes, Your Honor.

THE COURT: We could find it with that.

MR. GOHEEN: That is a FDCPA case; right?

MR. KEOGH: Yes.

ARGUMENT

MR. GOHEEN: Good morning, Your Honor. Again, Barry

Goheen with Tony Love representing the defendant.

Let me unpack some of the misstatements we just heard. First -- one of the last things we just heard was it is safe to assume they are a business or they sell to consumers. Well, that is exactly what can happen on class certification. I think Your Honor was just pointing out the burdens that they have.

THE COURT: Obviously there were consumers. I mean, the plaintiff is a consumer; right?

MR. GOHEEN: Right.

THE COURT: I mean, really -- I mean, it is White House Black Market. It is a women's retail clothing -- I mean, I think it is safe for everybody to assume that there were consumers that shopped there and that there may have been business cards that were used there.

MR. GOHEEN: I don't think there is any question about that.

THE COURT: Right.

MR. GOHEEN: That was my point. I mean, it is certainly safe to assume it is predominantly consumers. But it is also safe to assume that of 360,000 transactions all of them were consumer. That is a ridiculous assumption if that is what is being promoted here.

And I guess another thing is there was a point of, well, we didn't come out with statistics. Well, it is not our

burden. We don't have to do anything. It is their burden on ascertainability. That never changes.

They have had 27 months -- 27. This case was filed in July of '15. They have had 27 months to come up with their proof on class certification. So this, well, let's certify class and decertify it later, that is ridiculous. They have had all of the discovery they wanted. We have produced thousands of pages of documents. If they come up today 27 months after they filed the lawsuit and say, well, we don't have the data yet, that is completely inappropriate we would respectfully submit.

With regard to Mr. Coker, he made it very clear in his deposition he had not been engaged to talk about class certification issues.

THE COURT: No, that is not what he said at all. He said that he wasn't engaged to opine as to class certification. That is a very different statement than what you just said. I mean, he is giving -- his opinions may bear on issues that are relevant to class certification. But he is not giving an opinion as to whether the class should be certified. No expert can give that opinion.

MR. GOHEEN: I agree with that.

THE COURT: So I mean -- I don't view Mr. Coker's opinions as really inappropriate for consideration at this stage of the proceedings.

MR. GOHEEN: Well, we need to file a *Daubert* motion then because he is not remotely -- he didn't do any homework at all -- I mean, it is clear from his deposition this was a cookie-cutter thing that goes back 10 to 12 years when he was first hired by plaintiff's counsel when FACTA cases just started being filed. He did no research.

Probably one of the funniest things I have ever seen in a deposition before is when he put in his report, well, it is easy to find Jill Altman. Look what I did. I just went on the internet and put in Jill Altman, Atlanta, and I found her. Well, yeah, he found Jill Altman. He didn't find the Jill Altman in this case who lives in Austin, Texas, and not Atlanta.

That just is an idea of just how slipshod his work is. He cannot be relied upon for any purpose, let alone --

THE COURT: What about this business about identifying business transactions and consumer transactions?

MR. GOHEEN: There is no data that would --

THE COURT: Did you depose him about that?

MR. GOHEEN: I don't know that I did because --

THE COURT: It is in his report.

MR. GOHEEN: After he said he wasn't opining on issues on class certification, there was no need to talk about that, Your Honor. And it is their burden. And he can't say in an unsworn report that this is -- this I think can happen.

That is just not an appropriate basis for class certification.

THE COURT: He is not saying that exactly either. He is saying that in other cases he has taken this type of data. And when he has the first six digits of a credit card number, which presumably you all have produced to him in discovery, he can determine from those first six digits a variety of information, including whether or not the card was a business card or a consumer card.

So I mean, as I mentioned to Mr. Keogh, that to me was one of the biggest hangups I have with the plaintiff's motion here is making that analytical leap. Because Mr. Coker hasn't connected that dot. And to me, the issue that is most pressing in my mind is whether the failure to make that connection justifies denying the motion or if it is enough based on Mr. Coker's summary of what he has done in other situations to -- to find that they have met their burden at this point.

MR. GOHEEN: Well, ascertainability is the least of their problems, Your Honor.

THE COURT: Okay. Let's talk about the other ones.

MR. GOHEEN: Let's definitely talk about the other ones. They don't have standing.

THE COURT: Okay.

MR. GOHEEN: There is no way in the world they have standing. It is one thing to hold that based on unpleaded

allegations that they have standing. But they don't have -- the facts now are clear. There is no standing.

There was no harm. There was no injury. She's admitted she has no actual damages. She didn't do anything to mitigate the so-called risk of identity theft, which is just nonexistent and made-up anyway. And that simply isn't the case.

In the year 2017, I am aware of one case -- one -- that has denied a motion to dismiss in a FACTA case for lack of standing.

THE COURT: Yes. But unfortunately we have a situation here where the court has already ruled on standing in this case. And I'm not aware of any binding authority that would require that the court reexamine the earlier decision on standing in this case.

MR. GOHEEN: Absolutely it should. Standing needs to be -- needs to be met at all stages of the litigation.

THE COURT: What binding authority is there that would allow me at this stage --

MR. GOHEEN: We cited it in our papers.

THE COURT: Excuse me.

MR. GOHEEN: Go ahead, Your Honor. I'm sorry.

THE COURT: I mean, I would ask that you not interrupt me.

MR. GOHEEN: I apologize.

THE COURT: I know this is important to you and your client. But let's remember some civility here.

MR. GOHEEN: Thank you, Your Honor.

THE COURT: My question is: Is there any binding authority that would allow the Court at this point to revisit the Court's prior order finding that Ms. Altman had standing for Article III purposes?

MR. GOHEEN: Well, we cited the *Hutton* case, Your Honor, where there was --

THE COURT: Okay.

MR. GOHEEN: We cited that -- it is Eleventh Circuit, 1990 -- where the court in that case denied the motion for lack of standing; said the parties should take discovery and then revisit its standing at the summary judgment stage.

THE COURT: All right.

MR. GOHEEN: I mean, I guess I view this, Your Honor, as no different than any other motion -- I mean, like willfulness, for example. The Court denied our motion to dismiss on willfulness. Does that mean we can't now file a motion that there was no willfulness?

THE COURT: No, we're not saying that at all. Because what you're talking about in the *Hutton* case is that is summary judgment. This is class cert. Right. And willfulness is obviously going to be something you're going to argue at summary judgment.

And I am not entirely convinced that I can't revisit those issues or even if it is revisiting -- I think it may actually be visiting them properly at summary judgment at the merits.

MR. GOHEEN: Agreed.

THE COURT: But what I'm -- what I'm unclear about and not entirely convinced about is that I can revisit the Article III standing at this juncture given that we have already litigated the motion to dismiss.

MR. GOHEEN: I guess my view of that, Your Honor, would be -- I'm sorry. Were you --

THE COURT: Go ahead.

MR. GOHEEN: I apologize. I guess my view of that, Your Honor, would be class certification -- I think it is clear, and I think Your Honor was talking about this with counsel -- is made on a full record. It is not made on just the pleadings.

So the class certification decision necessarily must be assessed upon a very full record. And part of that full record here is the plaintiff's deposition where she again admitted or her discovery responses -- same thing -- admitted that she has no actual damages. And that is -- and that is -- they are asking 360,000 people who have no actual harm, if as they say they are similarly situated to one another, which I'll get to momentarily, for tens of millions of dollars or up to

$360 million in a case where the named plaintiff has had no harm.

I can tell you the number of Eleventh Circuit Court of Appeals opinions that have held that is proper -- zero -- in a FACTA case. There is none. I mean, that is -- this is a technical violation. There is no actual harm. It is admitted there is no actual harm. This is not what the procedural device of a class action was designed to do.

Since the *Meyers* case came down -- that is the Seventh Circuit case in December 2016 -- the first appellate court, in this case the Seventh, to weigh in on FACTA and standing post-*Spokeo* -- as I said, one case has denied a motion to dismiss. It was in Arizona. And I think it was February. And then another judge in the same courthouse later did grant a motion to dismiss. So you have got interdistrict battles going on there. So this is just not where the law is.

So I suppose the answer then would be we'll file a summary judgment motion on standing then if it is not appropriate to assess at the class certification stage. Because I guess our respectful view is it has to be assessed. I mean, that is -- the Eleventh Circuit has held probably time and time again, as we cited in our papers, any analysis of class certification begins with the issue of standing. *Prado-Steiman* being prominent on that. But there are a number of other cases.

So in a case where a claim was untimely, like *Piazza* or I think *Franze* was another one, the Eleventh Circuit held, well, they don't have standing. Now, we can quibble whether not having -- being expired of the statute of limitations equates to standing.

But putting that aside, the Eleventh Circuit certainly seems to suggest, if not outright hold, that this is something that class cert having -- part of that rigorous analysis that was discussed earlier must be assessed on a full record.

And that would include what the plaintiff herself says about standing. We would respectfully suggest that to ignore the plaintiff's deposition testimony would be error in this circumstance.

THE COURT: Let me ask you this. What information came out of her deposition that was not already readily apparent from the complaint? For instance, the fact that she had not been -- she was not seeking any damages for actual harm?

I mean, that was apparent in the complaint, and I think that that was something that everybody agreed on at the motion to dismiss.

What other facts have come to light?

MR. GOHEEN: Well, that she did absolutely nothing to try to mitigate the so-called risk of identity theft. Not one

iota.

THE COURT: That is a good segue to a question I did have. What relevance does mitigation have to the statutory damages calculation?

MR. GOHEEN: We are absolutely entitled to put on evidence of this plaintiff's action or inaction or errors or omissions or whatever she did after she found out that she had a supposedly noncompliant receipt. She rushed it over to her brother-in-law to race to the courthouse to file a lawsuit. Those are the facts. She did not do anything. She did not -- she did not put -- have a fraud alert placed on her file. She did not change credit cards. She did not file a police report.

The receipt itself had at least two websites and/or phone numbers to say, well, if you have any questions, call this. Didn't do that. Didn't contact her credit card issuer at all. Didn't contact the FTC, which happened to have a contact on her credit card account or monthly statement to say, if you think you've been a victim of identity theft, please call this number or access this website. She didn't do any of that.

She did not do anything. This is just made up. I mean -- and the one reason is -- and this was not in her -- in the complaint, by the way. This has been very important to the cases that have dismissed these cases as they should have at the standing -- at the motion to dismiss stage, including Judge

Scola in the case we cited a few weeks or a couple of weeks ago, *Gesten*.

The receipt never left her possession other than handing it to her brother-in-law and presumably her other counsel of record. That has been paramount to the courts that have held because there would be no reason -- there is no way there could be an identity theft if she has gotten the receipt.

THE COURT: But the thing is the statutory damages don't look to whether or not someone's identity was stolen or not; right?

MR. GOHEEN: That is not -- yes, I agree with that.

THE COURT: Yeah. That is where I'm having a difficult time trying to understand. Like what you said regarding mitigation makes absolute sense if you were talking about someone who is actually harmed. We all know Ms. Altman wasn't.

And what she and what she is trying to do on behalf of this class is to seek the statutory damages. You may call it a penalty. But what I'm still trying to figure out is: If a jury gets this case, will they hear about what she did or she didn't do after getting the receipt and will they consider that information in determining where in this spectrum of $100 and $1000 the award of damages should fall?

MR. GOHEEN: Absolutely. I mean --

THE COURT: What authority -- do you have any

authority that clearly says that that is what the jury is to consider of mitigation and relevant to statutory damages in a FACTA case?

MR. GOHEEN: We have cited authority that it is relevant in a FCRA case, as well as the influential Judge Wilkinson opinion that concurred in the *Stillmock* case where he said --

THE COURT: Right. That was a concurrence; right?

MR. GOHEEN: Yes, Your Honor -- where he said -- and cited much more than the original opinion as well. And what he said in that case was, businesses deserve the opportunity to argue that plaintiffs or class members or whatever the term is did not -- you know, that they should be -- that they should only be entitled to damages at the low end of the range, $100 to $1000 at the low end of that range depending on what they did or what they did in reaction to the receipt. Did they give it to someone, or was there an actual attempt of identity theft, or did they actually make efforts, unlike this plaintiff, to do something about it if they really genuinely felt a fear?

We know based on the facts she had no fear. She couldn't possibly have had that because she didn't do anything. We absolutely would have a right to put on a defense to a case, whether it is an individual case or in the context of a class action.

And obviously -- so the Court is aware that the Eleventh Circuit has held time and again that the Rules Enabling Act precludes there being any procedural adjustment in the context of a class action just because it is a class action.

So I can't -- I have tried FCRA cases before. I'm sure Mr. Keogh has as well. Of course, you are entitled to put on conduct of the plaintiff. I mean, they are seeking punitive damages too. Right? It has got to bear a reasonable relationship. I mean, that has to be relevant. If it is relevant to her, well, obviously it has to be relevant and we have to have that right to the other putative class members.

I mean, that has to be -- that has to be the law. I mean, that is just -- I think that just should be black letter law. But as we quoted in our papers, it is a little hard to imagine that an absent class member would want to tie his or her facts to this plaintiff based on all of that inaction that I just mentioned.

I mean, that is very -- you know, others may well have put on a fraud alert, talked to the police, and done something. Then they would be entitled to -- in the unlikely event they can prove willfulness, they may be entitled to $1000 versus the low end of the range.

But that I would respectfully suggest is why Congress set a range of $100 to $1000. So that there can be assessments

based on individual circumstances as to whether it should be 100, 500, or 1000, or nothing if the -- you know, obviously if willfulness is not proven. So that is why there is a range as opposed to $500.

THE COURT: I suppose Mr. Keogh is going to probably stand up and say, well, if you believe what Mr. Goheen is saying, you would never have a class certification in an FCRA case because it would be true in any case that mitigation would be relevant and really an individualized type of determination.

How would you respond to that?

MR. GOHEEN: Well, I don't -- I guess I can respond on whether that has been raised in a previous FCRA class action as opposed to how clearly it is an issue here. I mean, I don't know that mitigation has been or has not been accepted by courts in how various courts have assessed Fair Credit Reporting Act or its FACTA component.

Class actions -- I mean, chances are there have been other lawsuits that were much more homogenous than this one. But this is just not one of those cases where you have got someone that has gone through this sort of, you know, complete inaction and hired the brother-in-law, which kind of segues into adequacy.

This case was -- there is no adequacy of representation. Again, the Eleventh Circuit has held adequacy must be present at all stages in a class certification,

especially when you're talking about 360,000 people, none of whom apparently have any actual harm. We're going to -- you know, this is going to be proposed and they believe certified based on a sister-in-law and her brother-in-law filing a lawsuit. That just can't be.

I mean, that -- and then the attorney's lien was mentioned. All that did was lay open the infighting that is going on here. Clearly, there is going to be -- there is because their Kansas City counsel submitted an affidavit with their reply brief kind of taking to task the brother-in-law and so forth and so on. So there's clearly issues there that have not been vetted.

And I think there is pretty much an admission there that in the Eleventh Circuit a close relationship precludes class certification. *London* had that. *Schroder* had that. We cited other cases from other circuits. *Zylstra*, which actually is this circuit, the old Fifth Circuit -- it was in '78. Other cases from other jurisdictions.

So it is just a relationship here that it was never -- it was a conflict, to begin with. Let's put it that way. There appears to be not much of a dispute about that.

THE COURT: Did the conflict ever really manifest itself? I mean, was anybody prejudiced by the supposed conflict that you can tell?

MR. GOHEEN: I guess I would answer it two ways.

One, I don't know. Two, I would respectfully suggest it doesn't matter. I'm not aware of an Eleventh Circuit case that has said, well, A, you can cure the conflict. I'm not aware of a case that has said that, which is what they are trying to do here by bringing in other counsel. And, B, I'm not aware of Your Honor's question where, well, if there is no prejudice to the defendant, well, let's forget about it.

I would respectfully suggest -- and this is, of course, as Your Honor knows very clear, a fiduciary relationship that the plaintiff and her counsel occupy vis-a-vis the class. That goes back to *Kirkpatrick* at least, which was in '87, Judge Kravitch. So at least that far back, it is a fiduciary relationship. So that has nothing to do with the defendant. It just doesn't. There is nothing in the law that says, well, it is the defendants' issue.

The reason for the adequacy requirement is to protect the absent class members. So if the sister-in-law may try to incentivize or try to maximize the recovery for her brother-in-law at the expense of other class members, well, that's the problem. We cited the *O'Shaughnessy* case out of Missouri to do exactly that.

THE COURT: Well, I get that. That was the -- you know, going back to the *London* case, for instance, I mean, that was the big problem there because you had this relationship between stockbroker and his lawyer and all that stuff.

MR. GOHEEN: Right.

THE COURT: The court there was certainly concerned about present conflict of interest and the future conflict of interest. So where is the present -- is there a present conflict of interest though, or is there the potential for a future one as you see it?

MR. GOHEEN: Yes, Your Honor. Just because of the attorney's lien issue. I mean, he --

THE COURT: How does that -- how does that cause a conflict between, you know, Ms. Altman and the rest of the class or these lawyers and the rest of the class?

MR. GOHEEN: I think the answer -- I'm sorry. I think the question was the future conflict. If I may answer that, Your Honor.

THE COURT: Yes.

MR. GOHEEN: I would say that there is going to be infighting over fees. He has injected himself back into the case or reinjected himself into the case if he indeed had never really pulled out, which I don't think he did. I think he pulled out because plaintiff's counsel told him to.

But there is no -- there is no evidence that he is going to go away quietly. He is still the brother-in-law, as far as I am aware. It has been a few months since we deposed the plaintiff and everything.

Assuming for these purposes they still have the

familial relationship, I don't believe -- to me, the conflict is still there. Certainly the potential for conflict for fighting over attorney's fees, which could then come at the expense of the absent class members. Well, you know, we want a million dollars in attorney's fees. Well, actually I need to get another 25,000. I am Mr. Wexler. Okay. We'll take that out of the common fund.

I mean, to say that those things are purely hypothetical would be wrong. Because I'm sure Your Honor has had many occasions and many times where these sorts of things can happen. I'm not saying they do happen. But I think the question was where could it come up now or later, and I respectfully suggest that as long as this sort of infighting is out there among plaintiff's counsel, one of whom has a familial relationship with the plaintiff, the only plaintiff, the one who was the only and original counsel of record to begin with, I would suggest that that conflict is out there and it absolutely does not comply with long-held Eleventh Circuit law. They have some pretty stringent Eleventh Circuit cases out there on this.

And I would kind of -- the other side of the coin is that she did nothing to kind of vet her current counsel. I mean, she's not -- I mean, she did nothing to interview them. She said three times in her deposition because I asked her three times: Did you talk with the firm from Kansas City? No.

Shimshon did. Did you hire the firm from Kansas City? No. Shimshon did. Have you talked to the firm from Chicago? No. Shimshon did.

Even the firm in Atlanta, Mr. Holcombe's firm, had not met anybody until her deposition, which was 21 months into the lawsuit. They didn't even have an engagement letter. This is in a proposed nationwide class action. They didn't even have an engagement letter until March of 2017, 20 months into the lawsuit.

I mean, I have never heard of that before. I have had a few class actions. To not have -- to not even have a binding engagement letter for 20 months, I think that would suggest the closeness of the relationship was still in play at that point.

As the Court held in *London*, the requirement for a stringent examination of the adequacy of the class representative is especially great when as in this case the attorney's fees will far exceed the class representative's recovery.

I don't think anybody is going to stand up here and argue that the most you can get is $1000. They are going to seek many millions of dollars if they get the judgment they wanted. And that, we would respectfully suggest, falls squarely into *London*.

There must be a stringent examination. I don't think

they can -- I don't believe they could surmount any examination. But I really don't believe they can pass the *London* stringent examination test when their client can only get $1000 and they are going to request millions of dollars, if given the chance. That is why the *London* court held what it held.

Now, the final issue I want to talk about, Your Honor, is superiority. FACTA/FCRA contains a fee-shifting provision, of course, that allows the prevailing plaintiff to recover her reasonable attorney's fees, if she is successful. Courts everywhere, especially in this circuit, have denied class certification in FACTA cases and other FCRA cases for exactly this reason.

In fact, *Guarisma*, which we heard about earlier, one of the bases for denying in that case was exactly that reason, superiority. Then there is *Leysoto*. Then there is *Ehren*. Then there is the *Grimes* case. All from district courts in this circuit. All of which held that because FACTA has a built-in incentive for individual actions in the form of attorney's fees, as well as punitive damages if it is a particularly egregious violation, they are capable of individual adjudication and should be individually adjudicated.

Judge Acker had this to say in *Grimes*, which the *Guarisma* court quoted just three weeks ago to deny certification. And, in fact, we quoted it as well a few months

ago in our brief. Individual actions are not only feasible, but they are much more manageable than a class action would be, especially where there might be victims in many states. And that is Judge -- that is Judge Acker in *Grimes* in 2010.

Plus, appellate courts have held the same way. We cited the *Ticknor* case. That is a case from the Fifth Circuit in 2014. It affirmed the denial of class certification in a FACTA case because superiority was lacking.

Now, here is the key -- here is the key point. This is what we always hear. Well, this is a negative value case. No, it is not a negative value. It can't possibly be a negative value case. If you're able to get your attorney's fees, it cannot be -- per se, it cannot be a negative value case. That is what the Fifth Circuit held.

And I quote, it is difficult to categorize prevailing plaintiffs whose costs are covered and who are guaranteed more than nominal damages as negative value plaintiffs. That is the Fifth Circuit. That is a FACTA case. It is right squarely on point. It couldn't be any more on point.

And then, finally, there is the problem that I just alluded to a few moments ago of disproportionate recovery. Again, that is *London*. I think it is undisputed that they are seeking at a minimum 36 million -- and that is 360,000 times 100 -- up to 360 million, I guess. Math isn't my strong suit, but I think that plays out.

So -- but I don't think there can be any question that if such a judgment were entered that would be completely out of proportion to the alleged harm sustained by the class members, which, of course, is nonexistent. They didn't have any alleged harm by their own admission.

In the *Ehren* case -- that is the case out of the Southern District -- the court held certifying a class action that would impose annihilative damage where there has been no actual harm from identity theft could raise serious constitutional concerns. But that is *Ehren*.

The Eleventh Circuit held that -- and this is *London* -- that a proposed class action would likely fail the superiority requirement where the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff.

I'm sorry, Judge.

THE COURT: Let me ask you about *London*. I mean -- you said it held that. And a lot of other cases have called that dicta. Do you think it is a holding?

MR. GOHEEN: Let me answer it this way. It was in a footnote. If it is considered dicta, it was then given the beef the very next year by *Klay vs. Humana*, which is a case they actually cited in their brief.

So I'll accept Your Honor's characterization of that. You are correct.

THE COURT: It is not mine. It is just I want to make sure I understand what you are arguing. If you're arguing it is the holding, I wanted to hear from you.

MR. GOHEEN: You are right about that, Your Honor. If I said otherwise, I apologize to the Court. I think a lot of courts have held dicta. It is a long footnote at the end of *London*. I think it is Note 5.

So I don't -- I'm not arguing that point, and I'll accept Your Honor's, you know, view of that. And I don't disagree with it. I'm not trying to pick a fight. I think Your Honor is correct on that.

But my point -- but I will say this -- a couple of things. One is -- and I'll get to *Klay*. That's the first point. The second is a lot of courts, including judges in this court, have cited that, dicta or not. So they have applied *London*.

So I don't want to -- you know, whether we call it dicta, a holding, you know, just musings after they have already decided the certification needed to go back anyway and they just decided to continue on -- I mean, whatever we call it, reasonable minds certainly can argue --

THE COURT: It is certainly persuasive to me that the potential liability is something that may in some cases under some circumstances be a factor. I mean, I think the *Leysoto* decision is probably the starkest example. You know, you have

the pizzeria -- mom-and-pop pizzeria where they have -- the business is worth $40,000, and you've got potential liability between 4.6 and 46 million, and you're talking literally pennies if people were able to succeed there.

And so your circumstances are different in that y'all are not a mom-and-pop pizzeria. Nonetheless, the upper end of the statutory damages here is huge.

I mean, listening to the news today, I mean, I heard that a number of the states' attorneys general had settled with GM for the ignition switch issue for well under $360 million. And those are situations where people were harmed, killed. This is a case where nobody was apparently harmed, much less killed.

MR. GOHEEN: I agree.

THE COURT: And so there is something that is kind of shocking about a potential remedy that -- but it has been authorized by Congress at the same time. I know you know, as well as I know, that there are courts that say, well, look, we can deal with this issue later on. I mean, this may raise constitutional issues, and that can be handled later on. But --

MR. GOHEEN: I agree.

THE COURT: But, you know, try to persuade me with respect to this case as to why I should consider that now.

MR. GOHEEN: I will. But, first, you never been to

the Chico's pizza cafe?

THE COURT: Not Chico's. I've --

MR. GOHEEN: I'm just kidding.

THE COURT: Is it next to the White House Black Market cafe?

MR. GOHEEN: That is all right. I shouldn't have said that.

But in all seriousness, in *Klay* -- the very next year after *London*, the *Klay* court held -- I think this was Judge Tjoflat, as I recall. This is a quote. Whether the potential damages available in a class action are grossly disproportionate, not annihilative -- grossly disproportionate to the conduct at issue, close quote, is the most important factor in analyzing whether it is desirable to concentrate all of the claims in one forum for purposes of the superiority analysis. That is one of the components, I think, under 23(b)(3), superiority, whether it is desirable to put all the claims into one forum -- concentrate the claims into one forum.

So *Klay* to the extent -- well, I won't go back to that. I think *Klay* gave the *London* language a lot more beef in that particular instance by just coming right out and saying, this is the most important factor in that component of superiority.

And I guess I'll just take a slight frolicking detour. But in speaking of concentration of claims, why in the

world would this court want to burden itself with adjudicating 360,000 claims, whether class action or not -- but 360,000 claims where none of the named parties even reside in Atlanta?

I mean, the named plaintiff lives in Austin, Texas. Chico's -- I keep saying Chico's. That is the parent company. White House Black Market is in Fort Myers, Florida. There is no reason, respectfully, to congregate hundreds of thousands of claims in this court on such a flimsy basis. There is no reason -- that is another superiority component that is just not met here where you have neither party here in the city or this district, I should say, or even in Georgia, for that matter, in terms of its headquarters or citizenship or residence.

But in any event, there has been at least two judges in this court that I'm aware of, Your Honor, that have followed *Klay* and *London*, the language we just talked about. In the *Campos* case we cited in our papers, Judge Duffey denied certification to one of the classes in that case, which actually was brought under the Fair Credit Reporting Act, not FACTA, but another component of the FCRA where the class -- one of the classes, the one he denied, was seeking a class of 1 million persons.

So as Judge Duffey mentioned there, if certified, that could have had potential liability of $1 billion. He cited both *Klay* and *London*. And Judge Duffey held -- I quote

again -- here there exists substantial danger that plaintiffs are attempting to obtain a windfall based on minor technical violations. I would suggest that is right on point to what is going on here, a windfall based on minor violations.

Then Judge Batten in the *Hillis* case, which we also cited in our papers, denied the motion for class certification. And there were technical violations of the Credit Repair Organizations Act in that particular case.

And in that case, the damages would have yielded -- I'm sorry -- if liability was assessed and the class was certified, the liability would have been over $200 million. Judge Batten held, as follows -- and, again, this is language that is spot-on here. Quote, given that plaintiff has not suffered any economic loss and complains of technical violations and with an eye to the likelihood that class damages would be disproportionately large when compared to defendants' conduct, allowing this action to proceed in class form simply is not superior.

So we have Judge Duffey. We have Judge Batten applying these -- the language of *London* and of *Klay*. So I would respectfully suggest -- and, first of all, I agree with Your Honor. There is a Ninth Circuit case called *Bateman*, Seventh Circuit case called *Murray* -- they are not obviously binding on this Court.

What we have are language of *Klay*, language of *London*

that says this is the most important thing in this component of superiority. Is it grossly disproportionate? There is no mention in either case that, well, let's just push this off and certify class and then let's work on this afterwards.

I mean, that is just nowhere in that particular -- in those cases is any of that language suggested. So, you know, we're not in the Ninth Circuit or the Seventh or a couple of the other courts. So --

THE COURT: Let me ask you about *Hillis* real quick.

MR. GOHEEN: Sure.

THE COURT: If I recall correctly, the statute or act at issue in that case would have imposed strict liability. Does that -- is that a point of distinction? And if it is a distinction, does it really matter as opposed to here where the plaintiff is going to obviously have to prove willfulness in order to get a recovery at the end of the day?

MR. GOHEEN: Let me see if I can answer it this way, Your Honor, because I understand and I appreciate the question. But let me see if I can answer it this way.

If we're not entitled to put on that evidence of the plaintiff, then it is strict liability at some level I would suggest because then it becomes a trial on the defendants' conduct alone. And that I just -- I am not aware of any case under the FCRA that has ever allowed such a process, whether it is in an individual case or otherwise.

So in the pure FCRA/FACTA case, the answer to Your Honor's question is no, it is not a strict liability statute. And defendants, companies should be entitled to make their case as to why there was not a willful violation by focusing on what the plaintiff did, in addition to the whole calculus of the defendants' system and all the other things that Mr. Keogh mentioned at the outset of his remarks to Your Honor.

But if all we're going to do is focus on the defendants' conduct, putting aside but not ignoring the serious constitutional due process concerns, I think that would -- that would give rise to, then it becomes very close to a strict liability case in that instance. And then, you know, the Batten -- sorry -- Judge Batten *Hillis* ruling becomes much more in the -- in the realm of now we really need to be careful. Because if we're just going to try the defendants' conduct and then the defendant is subject to $300 million, you know, where is the due process there?

So that, I hope, answers Your Honor's question. But that is how I would answer it. I appreciate Your Honor's distinction in that that was a different statute. There was not -- as in the Judge Duffey case, it was not under the FCRA. So I get it that it was a CROA case. But depending on how the trial is structured, it really could come into play.

THE COURT: You know, let me ask you about that -- about -- going back to the mitigation issue. So if I

understand correctly, willfulness, is the plaintiff's conduct after she receives a receipt relevant to willfulness?

MR. GOHEEN: I believe it absolutely is, Your Honor.

THE COURT: How is that? Because it seems -- it seems like it might be relevant to determining where in the spectrum of statutory damages an award of damages should fall.

But whether or not there is willfulness at all, you are saying that that determination does -- rests in part on the plaintiff's conduct after receiving a non-truncated receipt?

MR. GOHEEN: Your Honor, I guess I would maybe respond this way. I don't see how willfulness can be judged in a vacuum. I guess that is how -- and I think I would make that response for any statutory claim -- I mean, of this ilk for any other FCRA claim. A background screening claim, which is also under the Fair Credit Reporting Act. Okay. There was a violation of the -- you didn't get a stand-alone disclosure. This is another Judge Duffey case earlier this year where he dismissed the case for lack of standing.

But if there was not an actual harm, we need to determine that. And I think that absolutely plays into willfulness. I don't see -- again, it goes back to a trial of the defendants' conduct. Do we even need a plaintiff? If we were to stipulate that she received the receipt in May of 2015, is there any need then? If we're not entitled to put her through cross-examination, is there any need to even have a

plaintiff in the case?

That is how, I guess, I would respond to that, Your Honor. Willfulness -- and, of course, we haven't gotten into this yet. We haven't briefed summary judgment and all that sort of stuff on the specific issue. I think Your Honor won't be surprised to learn that we strongly will oppose willfulness in this case at the appropriate time.

But, you know, certainly we're going to -- I believe there are cases out there that stand for the proposition that this sort of liability is not measured in a vacuum. And I think I would say this. I don't believe this is on point to Your Honor's question. So forgive me and bear with me.

But it goes a little bit to the trial and the damages issue. Statutory damages are intended to be a proxy for actual damages. The idea was actual damages are hard to -- sometimes actual damages are hard to ascertain. And therefore there is a substitute remedy given of $100 to $1000 without putting on other -- you know, the sort of proof that sometimes is required for actual damages under the FCRA.

And that is why I believe these other issues, what she did afterwards or what she did beforehand -- you know, if she's colluding -- that is not a fair term. If she and her -- and what seems to be clear from her deposition is she was sort of on the lookout for something like this.

I'm not saying that necessarily pejoratively. I'm

just saying that she with a brother-in-law and her family -- I think it is very clear from her deposition that they discussed these sorts of things and she was attuned to -- when she got receipts to see if they were compliant with the statute.

And once, you know -- once she got the statute {sic}, she immediately handed it to her brother-in-law and so forth and so on. You know, those sorts of facts certainly would be relevant. Right? The pre-receipt -- if we're drawing the line of demarcation there. So all of that I think would go into, you know, I think, the calculus as well.

So I believe -- and I believe the case law would support that willfulness is not something to be assessed strictly in a vacuum, that we would have to understand something and the jury would need to understand something about the named plaintiff.

So I'm sorry I've been up here a long time, longer than Your Honor hoped. I apologize for interrupting Your Honor.

THE COURT: This has been very helpful. You have done a very good job. Thank you, Mr. Goheen.

MR. GOHEEN: I appreciate that. The only thing I would say just to wrap up, as Your Honor pointed out, as the *Electrolux* court in the Eleventh Circuit held last year, there is a presumption against class certification just because it is an exception to the usual rule of individual adjudication.

We respectfully suggest that the plaintiffs have not overcome that presumption, and we think the motion should be denied.

Again, thank you for your time, Your Honor.

THE COURT: Thank you, Mr. Goheen.

Mr. Keogh.

ARGUMENT

MR. KEOGH: Thank you, Your Honor.

We heard a lot of what counsel believes the law should be, not what it is. The Supreme Court in *Safeco* discussed willfulness and held it is a knowing or reckless standard. In discussing the reckless standard, it held it was an objective test of whether a reasonable -- how a reasonable defendant would act.

It never discussed willfulness is whether -- in the plaintiff's actions. I mean, the fact that for half of the situations, it is an objective test even for defendant, which they use saying, well, it doesn't matter if we knew about the law. It really matters whether -- you know, whether reasonable across the board.

Not a single case has allowed mitigation in response to a statutory claim. Every case counsel talked about as cited in his brief, as we pointed out, sought actual damages. There is no mitigation.

So in willfulness you should --

THE COURT: So let me ask you then, to interrupt you: So the jury is given the authority by Congress to award somewhere between $100 or $1000. How do they make that determination?

MR. KEOGH: The degree of willfulness, Your Honor.

THE COURT: Okay. And does mitigation -- what Mr. Goheen is calling mitigation play any part in that? Does the conduct of the individual person play any role in the jury's award of damages?

MR. KEOGH: No, Your Honor. Because the Supreme Court even held that on recklessness the conduct of the defendant doesn't even play any role as far as whether or not there's reasonable actions. It is an objective test. Because in *Safeco*, they reversed the appellate court which held -- it was an insurance company. And it knew about the law. And both the district court and appellate court found that it knew about the law and its actions were unreasonable.

Well, the Supreme Court said it doesn't matter whether they knew about the law. It is an objective test. So, you know, we do need a plaintiff. And counsel can cross-examine her whether she -- on the date in question she used a card, whether it is a consumer card, if the Court rules that way. But they can't question her on the mitigation. Not a single case allows that, despite what counsel wants.

And so willfulness goes to the degree. And as the

Court alluded earlier too, that, you know, most of the cases talk about if there is a due process concern that is dealt with at the due process stage. You don't say that you violated it to such a grand scale that we can't hold you liable for class action.

And we cited the Supreme Court -- and I think it was Justice Stevens' concurrence -- saying that a class action simply turns -- it doesn't turn a 500-dollar case into a 5 million case. It is just the procedural vehicle. The Supreme Court had no problem aggregating statutory damages in those cases we cited.

And *Klay vs. Humana* certified the class. You know, the defendant is cherrypicking parts of *Klay* they like. But at the end of the day, they didn't have a problem certifying the class when they had to show willfulness. And that is the key here. It ties into this, as he said, not annihilating damage but disproportionate damages argument. There's only damages if we show willfulness. It is not strict liability.

So because we have to show willfulness, the Court shouldn't feel sorry for a defendant who willfully violated the law. And that is *Klay vs. Humana*. And they granted class certification, or they held that class certification was appropriate.

One thing I think I want to deal with very quickly is this venue argument. This has been litigated for two years.

They have never raised venue of whether this case belongs in Florida. I don't think the class certification -- they didn't even raise it in their briefs.

It is just a throw-away argument up here that has been waived and not appropriate, Your Honor. This Court has jurisdiction. It has venue. And they never said otherwise until 20 minutes ago.

And in discussing the standing argument and how it is appropriate here, defendant keeps on talking about she didn't suffer identity theft, she doesn't have actual damages, she has no standing because she has no actual damages. That has never been the test. That has never been the test pre-*Spokeo*, and it is not the test now.

The Supreme Court in *Spokeo* made it very clear you don't need actual damages. Injury in fact is a distinct legal issue besides economic damages. And as the Court already ruled in this case, she has sufficient Article III injury in fact. Nothing has changed.

Going to counsel's adequacy arguments, one thing he points out is there was no engagement letter until March 2017. Well, that is when we became involved, Your Honor. We have never done anything in this case without having a written engagement letter first. Neither myself nor Mr. Holcombe has lifted a finger in this case until we had a signed engagement letter with the plaintiff.

So to the extent that Mr. Wexler didn't have one, we rectified that. Mr. Wexler is not in this case. There is -- as counsel said, he is unaware of a case where you can, quote, hear that. There are cases holding that family relations are okay. They are usually frowned upon, but we cited cases allowing them.

If you want, I can send you half a dozen in 20 minutes saying that once you bring in new counsel you moot the issue because there is no more issue. You know, counsel talked about infighting of fees. If the Court holds that Mr. Wexler is entitled to some kind of quantum meruit, the FCRA awards fees in addition to any damages. So it is not coming out of any class fund.

And, Your Honor, to the extent it comes out of any class fund, the court can make one award. You know, it is not a matter of double-dipping between our fees and his fees or anything like that. You can have one award and deal with the lien that way where -- you know, I guess what I'm saying is we would be willing for -- that any fees that the court would ever award if it is a common fund issue come out of the same share.

So if we petition the court for X percent, those are all fees, however it is divvied up. So there is no conflict to the class here. The class gets the same amount of money whether Mr. Wexler receives zero or whatever.

THE COURT: Would Ms. Altman have any say in what

amount of fees Mr. Wexler should receive?

MR. KEOGH: No, Your Honor. And I don't think she has any say on the amount of fees we receive. It is the court's obligation to figure out what the fees are in a class action.

And, quite frankly, in the last -- I don't know -- dozen settlements I have done, for the most part anyway, we didn't even get defendant to agree on fees. It is fees that we'll petition the court for both an incentive award as well as attorney's fees. So there is no clear sailing.

And I would be agreeable to say that. I'll tell you right now we'll do the same thing in this case. If there is a settlement, we won't agree for fees or for incentive award. Because objectors look at that and say it is not proper. And, quite frankly, it doesn't really matter whether defendant agrees or not. It is what the court believes. You know, the defendant can agree to pay whatever. I have never had a judge really care that much, quite frankly.

So we would be willing to stipulate that any fees are contingent -- there will be no agreement by defendant for incentive or for fees. And there will be no clear sailing.

So, Judge, once again, most of the discussion was willfulness and the 100 to 1000. I think I covered that. For the most part, it is an objective test of the defendants' conduct, which actually helps them in quite a bit of ways.

But whether it is 100 or 1000, you know, really what they are asking you to do is, well, since there is a chance it might be more than 100, no one should get anything and no one should get class certified.

It is really throwing-the-baby-out-with-the-bath-water-type of argument, Judge. That on the off-chance that their actions here were so willful that they might be imposed a greater -- statutory damages more than $100. Well, no class should be certified because we acted too willfully and it is an individual issue. That doesn't make sense. And not a single case has held that.

So, Your Honor, I think I have covered most of the topics. And I would just ask if you want the cases where they say you can moot the potential conflict I can send them.

THE COURT: We have had plenty of briefing on this so far. But I appreciate the offer.

MR. KEOGH: Very good, Your Honor. So unless the Court has further questions, I have nothing else.

THE COURT: No. I appreciate the argument very much.

All right. I don't think there is anything further. I am going to take this under advisement. I suspect I'm going to get a ruling out probably early next week if I can. But I do want to just say for both of you I appreciate very much your argument. I think that it has been enormously helpful, and it is always good to have, you know, well-prepared lawyers who

live and breathe this stuff every day of their working career. So I'm very grateful to both of you for that.

So thank you. We can go off the record. We'll be in recess.

(The proceedings were thereby concluded at 10:18 A.M.)

C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 55 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 27th day of October, 2017.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT